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Applying the Common Interest Doctrine to Third-Party Litigation Funding

Jeffrey Schacknow

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APPLYING THE COMMON INTEREST DOCTRINE TO THIRD-PARTY LITIGATION FUNDING

ABSTRACT

Third-party litigation funding is an emerging industry that provides financial backing to plaintiffs. Typically, third-party litigation funders provide money in exchange for a percentage of damage returns. If the plaintiff's claim fails, then the third-party litigation funder loses its investment.

To decide whether a given plaintiff's claim is a good investment, the third-party litigation funder assesses the claim's merits by conducting due diligence over a large swath of documents. Often, these documents are protected by attorney-client privilege. Under normal waiver rules for attorney-client privilege, when privileged documents are disclosed to a third party, the privilege holder impliedly waives the privilege protection.

As an exemption from normal waiver rules for attorney-client privilege, the common interest doctrine has developed, preventing a waiver when a disclosure is made to a third party sharing a common legal interest with the privilege holder. Courts vary in their approaches to defining what constitutes a common legal interest, but typically the third-party litigation funder's commercial interest in a lawsuit is insufficient.

Although superficially this may appear a legitimate result (as the funders invest in a lawsuit without providing any direct legal assistance), it is largely incongruent with how courts apply the common interest doctrine for insurers and re-insurers. Most courts find that insurers of defendants (and re-insurers of insurers defending claims) have sufficiently common legal interests with privilege holders to invoke the common interest exemption from normal waiver rules.

In these insurance situations, sharing liability—to the extent that it constitutes a collaborative effort towards a joint defense of a claim—is sufficient to indicate a common legal interest. These insurers allow defendants to share the inherent risks with their lawsuits.

Consequently, third-party litigation funders deserve the same protection (afforded to insurers and re-insurers) offered by the common interest doctrine.

Recognizing the common interest doctrine to protect documents disclosed to insurers and third-party litigation funders effectuates the policy goal of attorney–client privilege; it enables litigants to most effectively obtain legal counsel.

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INTRODUCTION

Although third-party litigation funding has only recently gained traction in the United States, the idea of a party not directly involved in a given lawsuit providing capital to fund that lawsuit is not a modern business concept.¹ Previously, courts used the terms “maintenance” and “champerty” to describe

¹ Carol Langford, *Betting on the Client: Alternative Litigation Funding Is an Ethically Risky Proposition for Attorneys and Clients*, 49 U.S.F. L. REV. 237, 237 (2015).

various business arrangements where a party not directly involved in a suit contributed funds to one of the litigants.²

Tracing its origins to these historical antecedents, third-party litigation funding, in its modern form, originated in the 1990s in Australia.³ Following its start in Australia, third-party litigation funding has quickly emerged in the United States as an attractive investment option.⁴

What initiated as loan arrangements for primarily small lawsuits has grown into an industry focused on complex investment deals involving millions of dollars.⁵ Whereas the original model for third-party litigation funding provided small amounts of money through nonrecourse loans, the predominant mechanism is now to fund lawsuits in exchange for a share of the plaintiff's recovery.⁶

A number of diverse players have entered the industry. Primarily, these include hedge funds and private equity firms seeking to diversify their portfolios,⁷ high net worth individuals looking for a new investment opportunity,⁸ and companies whose primary business focus is investing in lawsuits.⁹

The industry attracts investors because the rate of return on investments is correlated with neither the performance of the stock market nor the health of the

² See Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 68–70 (2011). Historically, courts found it troubling that a party not actually involved with the suit could be the driving force behind the litigation. *Id.*

³ Geoffrey J. Lysaught & D. Scott Hazelgrove, *Economic Implications of Third-Party Litigation Financing on the U.S. Civil Justice System*, 8 J.L. ECON. & POL'Y 645, 648 (2012).

⁴ *Id.* at 649.

⁵ Holly E. Loiseau, Eric C. Lyttle & Brianna N. Benfield, *Third-Party Financing of Commercial Litigation*, IN-HOUSE LITIGATOR, Summer 2010, at 1, 7.

⁶ Joanna M. Shepherd, *Ideal Versus Reality in Third-Party Litigation Financing*, 8 J.L. ECON. & POL'Y 593, 594 (2012).

⁷ Loiseau, Lyttle & Benfield, *supra* note 5, at 7; see also Paul M. Barrett, *Back a Lawsuit, Get a Return: Investors Back Plaintiffs and Get a Share of the Proceeds in Return*, BLOOMBERG BUSINESSWEEK (Jan. 12, 2012, 9:04 PM), <https://www.bloomberg.com/news/articles/2012-01-12/back-a-lawsuit-get-a-return>; Catherine Ho, *Investment Firms Playing Role in Legal Field*, WASH. POST (Dec. 11, 2011), https://www.washingtonpost.com/business/capitalbusiness/investment-firms-playing-role-in-legal-field/2011/12/05/gIQAurh7nO_story.html?utm_term=.a6da8ae00fdb.

⁸ Loiseau, Lyttle & Benfield, *supra* note 5, at 7.

⁹ See STEVEN GARBER, ALTERNATIVE LITIGATION FINANCING IN THE UNITED STATES: ISSUES, KNOWNS, AND UNKNOWNNS 13–15 (2010), http://www.rand.org/pubs/occasional_papers/OP306.html.

economy.¹⁰ The merits of a company's potential legal claim, for example, have nothing to do with its stock price.

Some estimates suggest that investors in the U.S. third-party litigation funding market currently contribute upwards of \$1 billion directly to plaintiffs' firms,¹¹ and the potential market is close to \$33 billion.¹² Moreover, the nature of the jury trial and the consequent possibility of enormous damage awards creates the potential for third-party litigation funders to realize huge returns on their investments.¹³ In some lawsuits, the availability of punitive and treble damages makes investing even more attractive to prospective third-party litigation funders.¹⁴

However attractive the upside, investing in a lawsuit is not without risk. To mitigate risk, prospective third-party litigation funders conduct due diligence over large portions of information related to a case.¹⁵ Part of this due diligence process involves the plaintiff preparing documents for the third-party litigation funder and informing the third-party litigation funder about the case's merits.¹⁶ Often, case information conveyed to the third-party litigation funder is privileged.¹⁷ After assessing the risk¹⁸ of a particular lawsuit, the third-party litigation funders adjust the percentage of damages they receive from an investment.¹⁹ In some instances, third-party litigation funders draw up

¹⁰ See Lysaught & Hazelgrove, *supra* note 3, at 650. Non-correlated assets change in value irrespective of the traditional stock and bond markets. See generally Income Surfer, *The Importance of Non-Correlated Assets*, SEEKING ALPHA (Apr. 17, 2014, 3:00 PM), <http://seekingalpha.com/article/2147853-the-importance-of-non-correlated-assets>. Some investors opt for non-correlated assets to diversify a portfolio and see gains even when traditional markets are performing poorly. *Id.*

¹¹ Kirby Griffis, *Follow the Money: Litigation Funders Back Your Foes*, METROPOLITAN CORP. COUNS., July 2011, at 1, 6, <http://www.metrocorp.counsel.com/pdf/2011/July/01.pdf>.

¹² Lysaught & Hazelgrove, *supra* note 3, at 650.

¹³ Shepherd, *supra* note 6, at 600.

¹⁴ *Id.*

¹⁵ Ani-Rae Lovell, *Protecting Privilege: How Alternative Litigation Finance Supports an Attorney's Role*, 28 GEO. J. LEGAL ETHICS 703, 705–06 (2015).

¹⁶ See Michele DeStefano, *Claim Funders and Commercial Claim Holders: A Common Interest or a Common Problem?*, 63 DEPAUL L. REV. 305, 328 & n.102 (2014) (describing the process by which third-party funders analyze claims to determine the likelihood of success).

¹⁷ *Id.* at 327–28, 327 nn.98–99.

¹⁸ *Id.* at 313 (describing how third-party funders consider both the estimated time until a case is decided and the monetary value of the claim).

¹⁹ *Id.* (suggesting that the percentage of damage awards received by a third-party litigation funder can be anywhere from 20% to 50%).

arrangements providing that they receive the first portion of any damages awarded.²⁰

The industry's emergence has drawn polarizing reactions.²¹ Some commentators denounce the industry as a vehicle for funding frivolous lawsuits²² that needlessly extends the length of litigation.²³ Proponents of the industry respond that they are incentivized to fund meritorious claims,²⁴ claims which are too costly for a plaintiff to litigate without additional funding.²⁵ These investors allow cash-strapped plaintiffs to share the risk inherent with any lawsuit.²⁶

Rather than adding to the vast commentary on the relative merits and shortcomings of third-party litigation funding, this Comment analyzes novel concerns appearing before courts arising from the emergence of this industry. Specifically, courts are wrestling with whether information plaintiffs share with prospective funders, as a part of the funders' due diligence, is protected by either attorney-client privilege or work-product privilege.²⁷

This Comment examines two central issues regarding information shared with third-party litigation funders. First, it considers whether material prepared by a plaintiff for review by third-party litigation funders is protected by

²⁰ Joanna M. Shepherd & Judd E. Stone II, *Economic Conundrums in Search of a Solution: The Functions of Third-Party Litigation Finance*, 47 ARIZ. ST. L.J. 919, 941–42 (2015); see also Maya Steinitz, *The Litigation Finance Contract*, 54 WM. & MARY L. REV. 455, 467–71 (2012).

²¹ Shepherd, *supra* note 6, at 596–601.

²² JOHN BEISNER, JESSICA MILLER & GARY RUBIN, SELLING LAWSUITS, BUYING TROUBLE: THIRD-PARTY LITIGATION FINANCING IN THE UNITED STATES 5–6 (2009), <http://legaltimes.typepad.com/files/thirdpartylitigationfinancing.pdf>. Third-party litigation funders often provide capital to highly speculative lawsuits that present the opportunity for large awards. *Id.* Pursuing meritorious claims is not always their best investment strategy. *Id.* at 6; see also Shepherd, *supra* note 6, at 600 (discussing how third-party litigation funders “have little incentive to finance cases where plaintiffs face significant barriers to justice”). The opportunities for third-party funders to realize their largest returns comes in cases where the underlying laws create risk and cost imbalances favoring plaintiffs. *Id.* at 601.

²³ BEISNER, MILLER & RUBIN, *supra* note 22, at 6.

²⁴ See Lauren J. Grous, Note, *Causes of Action for Sale: The New Trend of Legal Gambling*, 61 U. MIAMI L. REV. 203, 206 (2006) (stating that plaintiffs may lack finances and be unable to pursue meritorious claims).

²⁵ *Id.* at 204–06.

²⁶ Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 GEO. L.J. 65, 72–73 (2010) (describing how funders permit plaintiffs to hedge their bet).

²⁷ See, e.g., *Doe v. Soc’y of Missionaries of Sacred Heart*, No. 11-cv-02518, 2014 WL 1715376 (N.D. Ill. May 1, 2014); *Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711 (N.D. Ill. 2014); *Mondis Tech., Ltd. v. LG Elecs., Inc.*, Nos. 2:07-CV-565-TJW-CE, 2:08-CV-478-TJW, 2011 WL 1714304 (E.D. Tex. May 4, 2011); *Leader Techs., Inc. v. Facebook, Inc.*, 719 F. Supp. 2d 373 (D. Del. 2010); *Charge Injection Techs., Inc. v. E.I. DuPont De Nemours & Co.*, No. 07C-12-134-JRJ (Del. Super. Ct. Mar. 31, 2015); *Carlyle Inv. Mgmt. v. Moonmouth Co.*, No. 7841-VCP, 2015 WL 778846 (Del. Ch. Feb. 24, 2015).

attorney–client privilege. If so, this Comment seeks to answer whether disclosure to a third-party litigation funder constitutes waiver of privilege, or the disclosure is exempt from waiver because of the “common interest doctrine.”

Second, and notwithstanding the attorney–client privilege question, this Comment considers whether material prepared by the plaintiff for review by third-party litigation funders is protected by work-product privilege. If so, it considers whether disclosure to a third-party litigation funder constitutes waiver of work-product privilege.

This Comment proceeds in four parts. Before addressing the questions of attorney–client privilege and work-product privilege, this Comment provides some background information on both. After laying that foundation, this Comment surveys caselaw surrounding issues of privilege and waiver in the context of third-party litigation funding. This discussion is timely, as the Supreme Court has yet to address the issue, and different jurisdictions have varied approaches.²⁸ To resolve the jurisdictional splits, this Comment examines legal arguments from the insurance industry. By considering third-party litigation funding as a plaintiff’s equivalent to what insurers provide for defendants, it will be easier to get away from ideological criticisms of third-party litigation funders. This Comment seeks to answer legal questions about the applicability of work-product privilege and attorney–client privilege and does not make partisan policy arguments either supporting or criticizing the third-party litigation funding industry.

Ultimately, this Comment explains why recognizing attorney–client privilege and work-product privilege for information plaintiffs share with third-party litigation funders protects clients’ interests while promoting the adversarial nature of the American judicial system. This Comment concludes that, from a public policy perspective, both attorney–client privilege and work-product privilege—along with their related exemptions from implied waivers—should be construed broadly in the context of third-party litigation funding.

²⁸ See *infra* Parts II, III.

I. DEFINING ATTORNEY–CLIENT PRIVILEGE AND WORK-PRODUCT PRIVILEGE

A. Attorney–Client Privilege

Attorney–client privilege derives from the English common law.²⁹ Although it has undergone various transformations since its early days, attorney–client privilege in the United States today is meant to encourage people to seek legal advice within the safe confines of confidentiality.³⁰ By creating an environment where clients may freely share even potentially damaging facts with their attorneys, clients receive higher quality legal advice because their attorney is fully aware of all the facts surrounding their case.³¹ In short, attorney–client privilege facilitates the effective rendering of legal counsel.

Operationally, attorney–client privilege protects communications, oral or written, made between an attorney and a client, from having to be divulged in a court proceeding or during discovery.³² The client may waive the privilege either voluntarily or by disclosing the information to a third party in a manner inconsistent with keeping it confidential.³³

Although ordinarily disclosure of privileged information to a third party impliedly waives the privilege, courts recognize a variety of related exemptions to maintain attorney–client privilege even when a disclosure is made.³⁴ Courts are not always consistent in how they identify these exemptions, at times using different names depending on the jurisdiction and the situation before the court.³⁵ For clarity’s sake, when dealing with any type of exemption from the

²⁹ 8 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2290, at 542 (McNaughton rev. ed. 1961). *But see* Max Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 CALIF. L. REV. 487, 487–88 (1928) (suggesting that attorney–client privilege’s lineage goes back even further to Roman times when slaves could not testify against their master and advocates could not testify against their clients).

³⁰ *See* Fisher v. United States, 425 U.S. 391, 403 (1976) (“The purpose of the [attorney–client] privilege is to encourage clients to make full disclosure to their attorneys.”).

³¹ *See* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); *see also* Lluberes v. Uncommon Prods., 663 F.3d 6, 23 (1st Cir. 2011) (“By safeguarding communications between attorney and client, the privilege encourages disclosures that facilitate the client’s compliance with law and better enable him to present legitimate arguments when litigation arises.”).

³² *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358–59 (D. Mass. 1950) (“The rule . . . allows a client to prevent the disclosure of information which he gave to his attorney for the purpose of securing legal assistance . . .”).

³³ 81 AM. JURIS. 2D § 348 (2016); *see also* Nguyen v. Excel Corp., 197 F.3d 200, 207 (5th Cir. 1999) (“When relayed to a third party that is not rendering legal services on the client’s behalf, a communication is no longer confidential, and thus it falls outside of the reaches of the privilege.”).

³⁴ *See* Katharine Traylor Schaffzin, *An Uncertain Privilege: Why the Common Interest Doctrine Does Not Work and How Uniformity Can Fix It*, 15 B.U. PUB. INT. L.J. 49, 55 n.14 (2004).

³⁵ *Id.* (collecting cases).

normal waiver rules for attorney–client privilege (involving parties with similar interests), this Comment refers to it as the “common interest doctrine.”

B. *Common Interest Doctrine*

Courts typically define the common interest doctrine as an exemption from normal waiver rules that apply when a third party to whom privileged information is disclosed shares a common *legal* interest with the party that made the disclosure.³⁶ Although it is tempting to construe the common interest doctrine as an extension of attorney–client privilege,³⁷ a more precise definition characterizes it as an exemption from normal waiver rules.³⁸ On the one hand, recognizing the common interest doctrine as an *extension* of an already-existing privilege indicates that third-party receivers of confidential information warrant having a privilege.³⁹ Conversely, characterizing the common interest doctrine as an exemption *constrains* the privilege to exist between the attorney and the client (but not the third party).⁴⁰

The linguistic debate may appear merely semantic, but it has practical consequences. Once courts start broadening attorney–client privilege, the floodgates open and the privilege may become overly expansive.

However, properly characterizing the common interest doctrine as an exemption means that third parties sharing a common legal interest with a litigant are not themselves entitled to a privilege; rather, an *already-existing privilege* is not waived if privileged information is shared with a party sharing a common legal interest. It is a fine distinction, but an important one nonetheless.

C. *Work-Product Privilege*

While attorney–client privilege protects communications between an attorney and a client,⁴¹ work-product privilege protects materials prepared for

³⁶ United States v. Schwimmer, 892 F.2d 237, 243–44 (2d Cir. 1989).

³⁷ See Schaffzin, *supra* note 34, at 54 n.12 (collecting cases).

³⁸ See *id.* at 55 n.13 (collecting cases).

³⁹ See *id.* at 68 (discussing how a major criticism of the common interest doctrine is that it broadens the attorney–client privilege’s applicability). Understanding the common interest doctrine to be an exemption for material already having an *underlying privilege* means that it does not broaden attorney–client privilege. See *id.*

⁴⁰ See *id.*

⁴¹ United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358–59 (D. Mass. 1950) (discussing when attorney–client privilege applies).

pending litigation.⁴² In deciding whether material deserves protection from work-product privilege, courts ask if the material was prepared in anticipation of litigation.⁴³

As with attorney–client privilege, a client can impliedly waive work-product privilege by disclosing the material to a third party.⁴⁴ But a disclosure to a third-party of material entitled to work-product privilege does *not* automatically waive the privilege.⁴⁵ This is because work-product privilege gives broader protection to information than attorney–client privilege.⁴⁶ A party waives work-product privilege if a disclosure is inconsistent with the adversarial process.⁴⁷ A disclosure is inconsistent with the adversarial process when it substantially increases the likelihood of the material becoming available to an adversary.⁴⁸

II. SURVEY OF CASELAW SURROUNDING PRIVILEGE PROBLEMS FOR THIRD-PARTY LITIGATION FUNDERS

This Part discusses the few federal district court cases that have addressed the waiver issue (along with the related common interest exemption) when privileged information is disclosed to third-party litigation funders. Considering that no appellate court has yet to take up the issue, this discussion is timely. After sketching the current lay of the land for the third-party litigation funders, this Comment turns to the insurance industry. This necessary groundwork will set up an analysis of the disparate treatments of waiver and privilege as applied to third-party litigation funders and insurers. By analogizing third-party litigation funders to insurers, it is clear that each is deserving of similar protections.

⁴² *Binks Mfg. Co. v. Nat'l Presto Indus.*, 709 F.2d 1109, 1118 (7th Cir. 1983); *see also* FED. R. CIV. P. 26(b)(3).

⁴³ *Nat'l Presto Indus.*, 709 F.2d at 1118; *see also* FED. R. CIV. P. 26(b)(3). Just because litigation eventually results does not necessarily mean material created prior to the lawsuit deserves work-product privilege. Rather, only if it was prepared *because* of pending litigation does it receive work-product privilege. *Nat'l Presto Indus.*, 709 F.2d at 1118.

⁴⁴ *Appleton Papers, Inc. v. EPA*, 702 F.3d 1018, 1025 (7th Cir. 2012).

⁴⁵ *See id.*

⁴⁶ *Id.* at 1024.

⁴⁷ *Id.* at 1024–25.

⁴⁸ *Id.* at 1025 (holding that disclosure waives work-product privilege if it “substantially increase[s] the opportunities for potential adversaries to obtain the information” (quoting 8 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 2024 (2012))).

The preeminent case,⁴⁹ *Miller v. Caterpillar*,⁵⁰ provides a comprehensive analysis of the privilege and waiver problems for third-party litigation funders.⁵¹ As no other federal case has analyzed the common interest doctrine as applied to third-party litigation funding in such detail, this Comment pays considerable attention to the case.

In 2014, the plaintiff in *Caterpillar* sued alleging misappropriation of trade secrets.⁵² The plaintiff contended that the defendant opted for a drawn out discovery process as a litigation tactic to drive up the cost of the lawsuit and thereby outlast the plaintiff.⁵³

Consequently, to finance its claim, the plaintiff sought out several third-party litigation funders before finally reaching an agreement with one of them.⁵⁴ The defendant contended that any financing agreement is illegal under a theory of maintenance⁵⁵ and sought discovery of the actual contract with the plaintiff's third-party litigation funder⁵⁶ as well as all the proposed agreements with the third-party litigation funders that the plaintiff had previously sought. The plaintiff responded that the funding contract itself is irrelevant and that any information that was provided to the third-party litigation funder is protected by either work-product privilege or attorney–client privilege.⁵⁷ Additionally, the plaintiff argued that disclosure to the third-party litigation funder did not waive privilege.⁵⁸ The defendant took an opposing view, arguing that any information about the case provided to a funder is not protected, and even if it was, disclosure of such information would thereby waive the privilege.⁵⁹

⁴⁹ See *Disclosure of Documents in Litigation Finance*, BENTHAM IMF (Aug. 2016), <http://www.benthamimf.com/what-we-do/disclosure-of-documents-in-litigation-finance> (stating that *Miller v. Caterpillar* reflects “the current state of the law”).

⁵⁰ 17 F. Supp. 3d 711 (N.D. Ill. 2014).

⁵¹ *Disclosure of Documents in Litigation Finance*, *supra* note 49.

⁵² *Caterpillar*, 17 F. Supp. 3d at 717.

⁵³ *Id.* at 718 (stating that even if defendant does not intentionally employ a “scorched earth policy” of cumbersome discovery, the general costs of litigation can make it difficult for certain plaintiffs to maintain a suit). The *Caterpillar* court expressly links the existence of “protracted discovery” as a reason for the rise of third-party litigation funding. *Id.*

⁵⁴ *Id.* at 719.

⁵⁵ *Id.*; see also Sebok, *supra* note 2, at 70–74 (discussing courts’ historical treatment of “maintenance” and “champerty”).

⁵⁶ *Caterpillar*, 17 F. Supp. 3d at 719.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

The court first addressed two of the defendant's arguments about documents detailing the actual funding arrangement. For the first of these preliminary issues, the court explored whether the funding agreement was relevant and therefore discoverable.⁶⁰ The court agreed with the plaintiff that the deal document, which outlined the contract agreement between the plaintiff and its funder, was not relevant because it had nothing to do with the claims or defenses in the case.⁶¹

Easily dispatching of the relevancy issue, the court next addressed whether the documents were discoverable as to show the real party in interest to the suit.⁶² The court held that though it is true that a case must be litigated in the name of the real party in interest,⁶³ the real party in interest is defined as the holder of the substantive legal claim.⁶⁴ For the court, all that existed between the plaintiff and the third-party litigation funder was a contractual relationship outlining the exchange of legal funding for a portion of potential damage returns.⁶⁵ Nothing about the funding contract suggested that the right to prosecute the legal claim transferred from the plaintiff to the third-party litigation funder.⁶⁶

Having disposed of these preliminary issues, the court set the stage to analyze both what kinds of privileges exist for information given to third-party litigation funders and how those privileges may be impliedly waived. The court's inquiry concerned the discoverability of the information contained within the "non-deal documents."⁶⁷ As the name suggests, the "non-deal documents" contained information regarding the merits of the case, not the particulars of the contract between the plaintiff and the third-party litigation funder.⁶⁸ The court divided its analysis into two parts: (1) attorney-client privilege and (2) work-product

⁶⁰ *Id.* at 721; *see also* FED. R. CIV. P. 26(b)(1).

⁶¹ *Caterpillar*, 17 F. Supp. 3d at 728.

⁶² *Id.* This issue is of some interest because the defendant maintained that the plaintiff's litigation financing arrangement is akin to subrogation in the insurance context. *Id.* Interestingly, courts often construe the common interest exemption to exist for insurers of defendants. *See infra* Part III. For the defendant here to liken the two industries could possibly do the defendant a disservice to its later contention about any privilege being waived by a disclosure.

⁶³ *Caterpillar*, 17 F. Supp. 3d at 728.

⁶⁴ *Id.*

⁶⁵ *Id.* at 728–30.

⁶⁶ *Id.*

⁶⁷ *Id.* at 730 (stating that this information very well may be relevant and would be otherwise discoverable). The issue is that even if it is relevant, it might still be barred from discovery because it is privileged. *Id.*

⁶⁸ *Id.* at 719 (describing the assertions of the parties where Miller says it has "produced any all documents that contain admissions or statements regarding the merits of the claims or defenses").

privilege, and the court recognized that the existence of either privilege shields the plaintiff.⁶⁹ This Comment addresses each part in turn.

A. Attorney–Client Privilege and Common Interest Doctrine

The court in *Caterpillar* began its privilege analysis by noting that documents prepared for business purposes alone are not entitled to protection by attorney–client privilege.⁷⁰ However, *legal advice* related to business purposes would be protected by attorney–client privilege.⁷¹ The court characterized information given to third-party litigation funders for the purpose of investing in a lawsuit as not confidential⁷² because the “contemplated funding transaction was merely commercial or financial.”⁷³ The court recognized that even the plaintiff contended that the relationship with its funders is nothing beyond one party financing another.⁷⁴ Relying on other courts’ understandings of attorney–client privilege,⁷⁵ the *Caterpillar* court suggested that information transmitted from a client to its attorney for the purpose of eventually reaching a third party that is not protected by privilege is not confidential and does not obtain attorney–client privilege.⁷⁶ Hence, the information provided by the plaintiff for a third-party litigation funder is not entitled to attorney–client privilege.⁷⁷

However, even though the court suggested that the “non-deal documents” are not protected by attorney–client privilege, the court seemed intent on addressing the question concerning waiver.⁷⁸ If the court had decided that the information was not protected by attorney–client privilege, then it could not inquire about applicability of the common interest doctrine. Thus, for the sake of argument, the court assumed that the plaintiff had satisfied its burden of showing that the information is protected by attorney–client privilege.⁷⁹

⁶⁹ See *id.* at 731, 734.

⁷⁰ *Id.* at 730.

⁷¹ *Id.* (noting that “legal advice relating to business matters clearly does” receive attorney–client privilege (quoting *Sullivan v. Alcatel–Lucent USA, Inc.*, No. 12 CV 7528, 2013 WL 2637936, at *2 (N.D. Ill. June 12, 2013))).

⁷² *Id.* at 730.

⁷³ *Id.* at 731.

⁷⁴ *Id.*

⁷⁵ *Id.* at 730; see also *United States v. Schussel*, 291 F. App’x 336, 347 (1st Cir. 2008); *United States v. Lawless*, 709 F.2d 485, 487 (7th Cir. 1983).

⁷⁶ *Caterpillar*, 17 F. Supp. 3d at 730.

⁷⁷ *Id.* at 731.

⁷⁸ *Id.*

⁷⁹ *Id.* (“Although [the defendant] has the better of the argument, we shall assume, *arguendo*, that Miller has sustained its burden of showing that the materials it provided to its lawyers for further submission to prospective funders were protected by the attorney–client privilege and proceed to the question of waiver.”).

Importantly, the court actively tried to address both the question of waiver and whether the common interest doctrine should apply.⁸⁰ The court did not gloss over these issues; rather, it made a concerted effort to address them.⁸¹ Consequently, as the court gave the common interest doctrine its full attention, its analysis is all the more pertinent to this Comment's discussion.

The court outlined the policy behind the attorney–client privilege, stressing that its purpose is to encourage complete disclosure to a party's legal counsel with the assurance of confidentiality.⁸² As a result, a “disclosure to a third party that eliminates that confidentiality constitutes a waiver of the privilege.”⁸³ The court noted that there is a split among the various jurisdictions regarding what constitutes a sufficient “common *legal* interest,”⁸⁴ and the crux of this Comment analyzes this split. For the *Caterpillar* court, having a “rooting interest” in the outcome of a lawsuit (as a third-party litigation funder has when investing in a plaintiff's case) is distinguishable from having a common legal interest.⁸⁵ The court argued that sharing a common legal interest means that parties actively plan litigation strategy together.⁸⁶ Using this definition, the court concluded that the third-party litigation funder at issue had no involvement with the strategy of the case.⁸⁷ The third-party litigation funder, although monetarily invested in the case, rooted from the sideline without providing any direct legal advice.⁸⁸ Hence, any non-deal documents protected by attorney–client privilege lost protection when the contents were disclosed to the third-party litigation funder.⁸⁹

Consider, though, how the court's reasoning undermines the policy goals of attorney–client privilege. By holding that the common interest doctrine does not apply, the court makes poorly capitalized plaintiffs wary of reaching out to third-party litigation funders. Effectively, this hinders this class's ability to obtain counsel.

In technical terms, if information protected by attorney–client privilege is disclosed to the very party for whom it was created—a party whose financing permits a litigant to afford counsel—then it is misguided to conclude that such

⁸⁰ See *id.* (describing waiver and its relation to the common interest doctrine).

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 732.

⁸⁵ *Id.*

⁸⁶ *Id.* at 732–33.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 734.

a disclosure could impliedly waive attorney–client privilege (a privilege intended to allow a litigant to obtain effective counseling). Simply, the purpose of the plaintiff making the disclosure, effective rendering of counsel, is the same purpose underscoring attorney–client privilege.

The court assumed that the “materials [the plaintiff] provided to its lawyers for further submission to prospective funders were protected by the attorney–client privilege,”⁹⁰ so that it could reach the question of waiver.⁹¹ If a court makes this assumption, then it is inconsistent to effectively undermine the policy of attorney–client privilege by suggesting that disclosing the information to the party intended to receive it (the party whose financing enables the lawsuit to go forward) should constitute a waiver of privilege.

The question really hinges on who receives the disclosure. If information is disclosed to a party other than the one for whom the information is created, or if it is disclosed to a party adverse or neutral to a lawsuit, then it follows that such a disclosure does nothing to encourage the policy goals of attorney–client privilege. Such a disclosure is consistent with an implied waiver of attorney–client privilege.

The *Caterpillar* court, however, could have countered that it was the plaintiff’s attorney for whom the plaintiff directly gave the materials. The attorney, then, turned the information over to the third-party litigation funder. As such, while the material may have been prepared to eventually reach the third-party litigation funder, it became privileged when created by the plaintiff for direct transfer to the attorneys. Whether the privilege remains when eventually reaching the third-party litigation funder, under this line of reasoning, is the exact kind of question that an implied waiver by disclosure to a third party is meant to address.

This response does not adequately emphasize the fact that the attorney is only an intermediary for the party’s true recipient. If the information is both warranting protection by attorney–client privilege *and* created so as to inform a third-party litigation funder about a case (a party whose very introduction into the case is to allow a litigant to offset the legal expenses inherent with any lawsuit), it would be a procedural faux pas to remove the material’s protection *because* the material reached its intended destination. As the purpose of the

⁹⁰ *Id.* at 731.

⁹¹ *Id.*

attorney–client privilege is to encourage effective rendering of counsel,⁹² holding that the common interest doctrine does not apply when a plaintiff shares information with a third-party litigation funder undermines the very privilege which the common interest doctrine was developed to support.

B. *Work-Product Privilege and Waiver*

If the plaintiff cannot avail itself of the “common interest doctrine” with respect to information protected by attorney–client privilege, might work-product privilege provide an alternative protection? Information protected by work-product privilege includes “the mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the litigation.”⁹³ The plaintiff in *Caterpillar* contended that information given to potential third-party litigation funders about attorneys’ mental impressions was created “because of” the lawsuit and thus should be treated as protected work product.⁹⁴

The *Caterpillar* court noted a circuit split regarding the appropriate test for assessing whether something is protected work-product.⁹⁵ Along with the plaintiff’s proposed “because of” test⁹⁶ used by the Second Circuit, the court references⁹⁷ the Sixth Circuit’s test that asks whether the party invoking privilege can show that the lawsuit was the “driving force behind the preparation of each requested document.”⁹⁸ Ultimately, the *Caterpillar* court adopted the “because of” test, suggesting that to do otherwise threatens to undermine the policy behind work-product privilege.⁹⁹ Any other test does not adequately assess whether a document was prepared in anticipation of litigation.¹⁰⁰ Citing Seventh Circuit precedent, the court stated that “the test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained *because of* the prospect of litigation.”¹⁰¹

⁹² *United States v. Buckley*, 585 F.2d 498, 502 (5th Cir. 1978).

⁹³ *Caterpillar*, 17 F. Supp. 3d at 734 (citing FED. R. CIV. P. 26(b)(3)(B)).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* The defendant adopted this test from language used by the Second Circuit in *United States v. Adlman*, 134 F.3d 1194, 1199 (2d Cir. 1998).

⁹⁷ *Caterpillar*, 17 F. Supp. 3d at 734.

⁹⁸ *In re Prof’ls Direct Ins.*, 578 F.3d 432, 439 (6th Cir. 2009) (quoting *United States v. Roxworthy*, 457 F.3d 590, 595 (6th Cir. 2006)).

⁹⁹ *Caterpillar*, 17 F. Supp. 3d at 734–35.

¹⁰⁰ *Id.* at 735.

¹⁰¹ *Id.* (quoting *Binks Mfg. Co. v. Nat’l Presto Indus.*, 709 F.2d 1109, 1119 (7th Cir. 1983)).

The *Caterpillar* court wisely observed that any documents containing theories and mental impressions created to analyze the merits of the case should not per se lose work-product status because they may also have a dual purpose of apprising funders of the legal scenario.¹⁰² The correct question is not *if* these documents are protected work-product, but rather given that they are work product, do they lose protected status by disclosure to potential funders?¹⁰³

In answering the question, the court distinguished between attorney–client privilege and work-product privilege: while materials protected by attorney–client privilege lose their protection when a disclosure is made to third-party litigation funder,¹⁰⁴ the same is not necessarily true of information protected by work-product privilege.¹⁰⁵

The court made this distinction because of the two different policy goals underlying each privilege.¹⁰⁶ While attorney–client privilege protects confidential communications between attorneys and clients, work-product privilege is geared towards promoting the adversarial litigation system.¹⁰⁷

Consequently, for attorney–client privilege, a party automatically waives privilege if it makes a disclosure that is inconsistent with keeping communications between an attorney and client confidential.¹⁰⁸ For work-product privilege, a waiver occurs if information is disclosed “in a manner that ‘substantially increase[s] the opportunity for potential adversaries to obtain the information.’”¹⁰⁹

Thus, the court’s inquiry regarding whether there was a waiver of materials protected by work-product privilege centered on this adversarial risk.¹¹⁰ If a party can show a disclosure to a third party did not make it *substantially* more likely that the information would fall into the hands of the adversary, then no waiver occurred.¹¹¹

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 731–33.

¹⁰⁵ *Id.* at 735–36.

¹⁰⁶ *Id.* at 736.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 731, 735.

¹⁰⁹ *Id.* at 736 (quoting *Appleton Papers, Inc. v. EPA*, 702 F.3d 1018, 1025 (7th Cir. 2012)).

¹¹⁰ *See id.*

¹¹¹ *See id.*

The *Caterpillar* court noted that the plaintiff accounted for the risk of its adversary obtaining privileged information by using confidentiality agreements with potential third-party litigation funders.¹¹² When discussing financing arrangements without a written confidentiality agreement, the plaintiff made sure orally that potential funders knew that shared information was to be kept “strictly confidential.”¹¹³

With respect to these oral arrangements, so long as there was an offer for shared information to be kept confidential and subsequent acceptance by a third-party litigation funder, the court treated the oral confidentiality arrangements the same as written ones.¹¹⁴

For the *Caterpillar* court, showing the existence of confidentiality agreements is sufficient to recognize non-waiver, but it is not necessary.¹¹⁵ The court did not need to delve deeply into the issue here because the plaintiff did not advance this argument,¹¹⁶ but the court suggested that the lack of a confidentiality agreement would not necessarily be fatal for the issue of waiver.¹¹⁷ For example, the court considered a potential argument suggesting that because it would not be in the best interest of third-party litigation funders to share privileged information with an investee’s adversary, then there is a reasonable expectation of confidentiality when the funder receives privileged information.¹¹⁸

Interestingly, on the one hand, when discussing work-product privilege, the court suggested that it is reasonable to expect a third-party litigation funder would keep information shared by the plaintiff confidential.¹¹⁹ But earlier, when the court discussed attorney–client privilege, the court relied on the logic that if a client transmits information to its attorney for the purposes of disclosing the

¹¹² *Id.*

¹¹³ *Id.* (noting that the plaintiff’s assertion that oral agreements with the funder were understood to be confidential could be characterized as a legal conclusion for the court to make, but because the defendant did not raise this argument on its own, the argument is waived).

¹¹⁴ *Id.* at 737. It is worth noting that while the burden for attorney–client privilege is on the party asserting privilege to show no waiver, the opposite is true for work-product privilege. *Id.* For work-product privilege, the party asserting a waiver must affirmatively show its adversary took steps to make it more likely that confidential information could become available to the party asserting waiver. *Id.*

¹¹⁵ *Id.* at 738.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *See id.*

information to a third party not protected by privilege, then the disclosure is presumptively not confidential.¹²⁰

The court does not address this incongruity, so it is impossible to know exactly why a disclosure to a third-party litigation funder is not confidential in the attorney–client privilege context but is for purposes of work-product privilege. The court’s presumption of non-confidentiality in the attorney–client privilege context is a bright line rule; it does not focus on the specifics of the actual parties involved. On the other hand, for purposes of work-product privilege, the court analyzes the actual plaintiff and third-party litigation funder involved in the case to determine that a disclosure to a third party can be confidential.¹²¹

Whereas the court’s discussion of confidentiality for purposes of attorney–client privilege is blunt and rigid, its discussion of confidentiality for purposes of work-product privilege is nuanced and intuitive. The attorney–client privilege discussion of confidentiality serves as an adequate starting presumption. But when a court has sufficient facts to know the likely intentions of the actual parties involved (as it does in *Caterpillar*), the approach to confidentiality when discussing work-product privilege better approximates the reality of a particular case.

C. Takeaways from *Caterpillar*

The *Caterpillar* court’s analysis of the “common interest doctrine” for third-party litigation funding is the one issue from the case that most divides courts around the country.¹²² Although *Caterpillar* exemplifies the majority approach, a substantial minority of courts find that third-party litigation funders do have a sufficiently common legal interest with plaintiff-investees to warrant applying the common interest doctrine.¹²³ These courts exempt plaintiffs from waiver of privilege when they share information with third-party litigation funders.¹²⁴

But even if most courts are unwilling to recognize the common interest exemption from normal waiver rules for attorney–client privilege, litigants may

¹²⁰ *Id.* at 730.

¹²¹ *Supra* notes 110–18 and accompanying text.

¹²² *See infra* notes 123–25 and accompanying text.

¹²³ *See, e.g.,* Fresenius Med. Care Holdings v. Roxane Labs., No. 2:05-CV-0889, 2007 WL 895059, at *1–2 (S.D. Ohio Mar. 21, 2007); Rembrandt Techs., L.P. v. Harris Corp., No. 07C-09-059-JRS, 2009 WL 402332, at *7 (Del. Super. Ct. Feb. 12, 2009).

¹²⁴ *See supra* note 123.

be tempted to think that work-product privilege is sufficient to protect their confidential information. After all, a litigant need only avail itself of one privilege.

True, the *Caterpillar* court's discussion of work-product privilege for third-party litigation funders has much more consensus,¹²⁵ but, hypothetically, a third-party litigation funder could make a request of documents that exceed what would be protected under work-product privilege.¹²⁶ For example, it is foreseeable that a third-party litigation funder requests documents that go beyond what an attorney would prepare in anticipation of litigation.¹²⁷

The plaintiff could argue that any documents disclosed to a third-party litigation funder necessarily are prepared in anticipation of litigation; the plaintiff would never contact a third-party litigation funder unless anticipating litigation. However, a wary court might hold that at least some document requests go beyond what an attorney would generate in anticipation of litigation.

In such a scenario, the plaintiff could not avail itself of work-product privilege to prevent discovery requests by the defendant. If the court does not recognize the common interest doctrine as an exemption to disclosures to third-party litigation funders protected by attorney–client privilege, then the plaintiff is out of luck.

D. Other Courts' Understandings of Attorney–Client Privilege and Common Interest Doctrine for Third-Party Litigation Funding

Some courts do not hold *Caterpillar*'s strict interpretation of what constitutes a common *legal* interest between a litigant and third-party litigation funder.¹²⁸ In a Delaware state court case, the court held that the agreement between a third-party litigation funder and a litigant “to enforce and exploit . . . patents through litigation,” evidenced a sufficiently similar legal interest to apply the common

¹²⁵ Several cases came after *Caterpillar* that support its treatment of work-product privilege. *See, e.g.*, *Doe v. Soc’y of Missionaries of Sacred Heart*, No. 11-CV-02518, 2014 WL 1715376, at *4 (N.D. Ill. May 1, 2014); *Charge Injection Techs., Inc. v. E.I. Dupont De Nemours & Co.*, No. 07C-12-134 (Del. Super. Ct. Mar. 31, 2015); *Carlyle Inv. Mgmt. v. Moonmouth Co.*, No. 7841–VCP, 2015 WL 778846 (Del. Ch. Feb. 24, 2015). The *Caterpillar* court borrowed its analysis of work-product privilege from other courts. *See, e.g.*, *Mondis Tech. v. L.G. Elecs., Inc.*, 2:07-CV-565-TJW-CE, 2:08-CV-478-TJW, 2011 WL 1714304, at *2 (E.D. Tex. May 4, 2011).

¹²⁶ Jihyun Yoo, *Protecting Confidential Information Disclosed to Alternative Litigation Finance Entities*, 27 GEO. J. LEGAL ETHICS 1005, 1012–13 (2014).

¹²⁷ *Id.*

¹²⁸ *Rembrandt Techs., L.P. v. Harris Corp.*, No. 07C-09-059-JRS, 2009 WL 402332, at *7 (Del. Super. Ct. Feb. 12, 2009).

interest doctrine.¹²⁹ For this court, the fact that the parties' arrangement was in regards to litigation meant a shared legal interest.¹³⁰

Similarly, at least one court has held that the question of whether to apply the common interest doctrine hinges on if the litigant and third party are engaged in a shared enterprise and whether the legal advice (information) exchanged relates to that enterprise.¹³¹

Seeing that these courts are more lenient than *Caterpillar* raises the question of what is the best definition of a common *legal* interest. To answer this question, this Comment proceeds by looking at how the common interest doctrine is applied to both defendants exchanging privileged information with their insurers and insurers exchanging privileged information with their re-insurers.

III. PRIVILEGE PROBLEMS FOR INSURERS AND RE-INSURERS

At first glance, insurers and re-insurers share many of the same characteristics for defendants, as third-party litigation funders do for plaintiffs.¹³² Both distribute risk. Both need to analyze privileged information to better understand the merits of a litigant's case.

Despite this apparent similarity between the two industries, courts apply the common interest exemption differently for each of them. Generally, courts readily permit the common interest doctrine as an exemption from normal waiver rules when an insured defendant seeks to share privileged information with its insurer (or when an insurer seeks to share privileged information with a re-insurer).¹³³ Conversely, as discussed earlier, courts tend to hold that the common interest doctrine does not apply when plaintiffs share privileged information with a third-party litigation funder.¹³⁴

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Fresenius Med. Care Holdings v. Roxane Labs., Inc.*, No. 2:05-cv-0889, 2007 WL 895059, at *1 (S.D. Ohio Mar. 21, 2007). This same court also recognized a 1996 Federal Circuit case, *In re Regents of University of California*, 101 F.3d 1386, 1389 (Fed. Cir. 1996), where the common interest doctrine was applied to enforce patent rights. *Fresenius Med. Care Holdings*, 2007 WL 895059, at *3. The court held that two parties sharing exclusive patent rights had a common legal interest in enforcing their joint patent rights. *Id.* The court mentioned the litigants had a common legal interest despite that their shared interest was primarily commercial. *Id.*

¹³² Symposium Panel, *Third-Party Litigation Funding*, 8 J.L. ECON. & POL'Y 257, 274 (2011) (discussing the analogy between insurers and third-party funders).

¹³³ *See Fresenius Med. Care Holdings*, 2007 WL 895059, at *2.

¹³⁴ *See Mondis Tech. v L.G. Elecs., Inc.*, No. 2:07-CV-565-TJW-CE, 2011 WL 1714304, at *4 (E.D. Tex. May 4, 2011).

This Comment proceeds by analyzing courts' rationales for why insured defendants can avail themselves of the common interest doctrine for privileged information shared with their insurers. This analysis shows that courts' rationale for applying the common interest exemption to insurers and re-insurers could also apply to third-party litigation funders.

A. *Common Interest Doctrine for Insurers*

In many insured–insurer cases addressing attorney–client privilege, courts recognize insurers and insured as joint clients.¹³⁵ One court has characterized this relationship by saying that “confidential communications between either the insurer or the insured and counsel are protected by the attorney–client privilege, and both the insurer and insured are holders of the privilege.”¹³⁶ Two immediate differences exist between this type of interaction and the one between potential plaintiffs and third-party litigation funders. First, the insurer is contractually obligated to provide defense for the insured.¹³⁷ The insured and insurer are already involved with one another prior to the emergence of the lawsuit. Conversely, third-party litigation funders only enter the scenario once a lawsuit is pending.¹³⁸ Second, the insurer is financially interested in the outcome of the insured's case just by the fact that the insured is being sued.¹³⁹ The insured cannot walk away from a claim it would rather not defend. This contrasts with the third-party litigation funder who has no legal obligation to pursue a case it does not like.¹⁴⁰

These two distinctions suggest a rationale for why the tri-partite relationship between insured, insurer, and attorney obtains attorney–client privilege for confidential information shared amongst them but third-party litigation funders are unable to avail themselves of attorney–client privilege. In these typical insurer and insured relationships, the courts do not have to address the common

¹³⁵ Grace M. Giesel, *Alternative Litigation Finance and the Attorney–client Privilege*, 92 DENV. U. L. REV. 95, 122 (2014); see, e.g., *Bank of Am., N.A. v. Superior Court of Orange Cty.*, 151 Cal. Rptr. 3d 526, 541 (Cal. Ct. App. 2013).

¹³⁶ *Bank of Am., N.A.*, 151 Cal. Rptr. 3d at 531.

¹³⁷ Giesel, *supra* note 135, at 122.

¹³⁸ Charles Silver, *Litigation Funding Versus Liability Insurance: What's the Difference?*, 63 DEPAUL L. REV. 617, 621 (2014).

¹³⁹ *Id.*

¹⁴⁰ See Michelle Boardman, *Insurers Defend and Third Parties Fund: A Comparison of Litigation Participation*, 8 J.L. ECON. & POL'Y 673, 680 (2012) (noting that the insurer's involvement in litigation, unlike a litigation funder's involvement, “is automatic, not an investment choice”).

interest question because both insurer and insured are understood as clients having the same attorney, neither is a third party to which a disclosure is made.¹⁴¹

However, cases exist where the insured has separate counsel from the insurer.¹⁴² The insurer's role here is simply to fund the defense,¹⁴³ much like a third-party litigation funder would for a plaintiff. In *Lectrolarm Custom Systems v. Pelco Sales*, the plaintiff sued the defendant for patent infringement.¹⁴⁴ The defendant shared information protected by attorney–client privilege with its insurer.¹⁴⁵ During discovery, the plaintiff sought out this shared information, asserting that because the defendant disclosed the information to a third party, the defendant waived privilege.¹⁴⁶ The court invoked the common interest exemption even though the insurer and the defendant each had its own counsel.¹⁴⁷

Moreover, the insurer had elected only to defend some of the defendant's claims.¹⁴⁸ Yet, even though the insurer elected not to defend all the claims, this issue was not dispositive. Rather, the court held that because the defendant and the insurer undertook a “joint defense effort,” with at least some of the claims, the insurer and defendant had a sufficient “commonality of interest” to prevent disclosure from waiving attorney–client privilege.¹⁴⁹

B. Common-Interest Doctrine for Re-Insurers

Additionally, many cases have examined whether insurers sharing information protected by attorney–client privilege with re-insurers automatically

¹⁴¹ See *Fresenius Med. Care Holdings*, 2007 WL 895059, at *2.

¹⁴² Giesel, *supra* note 135, at 123.

¹⁴³ *Id.*

¹⁴⁴ *Lectrolarm Custom Sys. Inc. v. Pelco Sales, Inc.*, 212 F.R.D. 567, 568 (E.D. Cal. 2002).

¹⁴⁵ *Id.* at 568–70.

¹⁴⁶ *Id.* at 569.

¹⁴⁷ *Id.* at 572.

¹⁴⁸ *Id.* at 571.

¹⁴⁹ *Id.* at 572. While the court did not provide a comprehensive analysis of its own, it refers to several cases all suggesting that parties engaged in a common legal enterprise satisfy the standard for the common interest exemption. *Id.*; see, e.g., *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989); *Eisenberg v. Gagnon*, 766 F.2d 770, 787 (3d Cir. 1985); *Griffith v. Davis*, 161 F.R.D. 687, 692 (C.D. Cal. 1995). *But see* *First Pacific Networks, Inc. v. Atl. Mut. Ins.*, 163 F.R.D. 574, 581–82 (N.D. Cal. 1995) (holding that in a case between the insured and the non-defending insurer, the non-defending insurer has no common interest in privileged communications between insured and defending insurer). The *Lectrolarm* court distinguishes *First Pacific Networks* arguing that although the non-defending insurer may have no common interest in communications between the defending insurer and the insured, that does not imply that a defending insurer likewise does not have common interest in communications between itself and the insured. *Lectrolarm Custom Sys., Inc.*, 212 F.R.D. at 572–73.

waive privilege by making such a disclosure. Generally in these types of cases, *insurers* seek to invoke the common interest exemption to prevent the *insured* from accessing the information shared with the *re-insurer*.¹⁵⁰ These situations are particularly analogous to third-party litigation funding because the re-insurers often do not offer any concrete legal strategy. Any common *legal* interest these re-insurers have with the original insurer is based on sharing liability concerns.

Courts have not uniformly analyzed cases where insurers try to invoke the common interest exemption for information shared with re-insurers.¹⁵¹ Although courts on both sides require that the party receiving privileged information and the party giving information have sufficiently common interests to invoke the exemption, the courts differ (much like as they did with the third-party litigation funders) on how to define a sufficiently common interest.¹⁵²

Great American Surplus Lines Ins. v. Ace Oil illustrates the approach of recognizing that the common interest doctrine applies for re-insurers. In that case, the court held that because an insurance agent's disclosure of privileged documents to a re-insurer was "reasonably necessary," the disclosure did not constitute waiver of privilege.¹⁵³ The court argued that good business practices

¹⁵⁰ 1 DAVID M. GREENWALD, TESTIMONIAL PRIVILEGES § 1:111 (3d ed. 2015).

¹⁵¹ *Id.* (collecting cases where courts have held, in the re-insurer context, that the common interest doctrine prevented privilege waiver); see also, e.g., *Great Am. Surplus Lines Ins. v. Ace Oil Co.*, 120 F.R.D. 533, 538 (E.D. Cal. 1988) (holding that the disclosure of documents by insurer to re-insurer did not constitute waiver of privilege because the re-insurer, having a financial stake in the outcome of the suit, had a "need to know" the shared information); *Durham Indus. v. N. River Ins.*, No. 79 Civ. 1705, 1980 WL 112701, at *3 (S.D.N.Y. Nov. 21, 1980) ("[W]here the reinsurers bear a percentage of liability on the bond, their interest is clearly identical to that of [the defendant insurer]."); *Hartford Steam Boiler Inspection & Ins. v. Stauffer Chem. Co.*, No. 701223, 1991 WL 230742, at *2 (Conn. Super. Ct. Nov. 4, 1991) (holding that the interests of the insurer and re-insurer were "inextricably linked by the reinsurance treaty" that imposed 7.5% share of any liability on the insurer).

For a list of cases where courts have held, in the re-insurer context, that the common interest exemption does not apply, see *Regence Grp. v. TIG Specialty Ins.*, No. 07-1337-HA, 2010 WL 476646, at *2-3 (D. Or. Feb. 4, 2010) (ruling the insurer could not assert common legal interest over communications with re-insurer when the two parties had previously engaged in contested arbitration with one another); *Reliance Ins. v. Am. Lintex Corp.*, No. 00 CIV 5568 WHP KNF, 2001 WL 604080, at *4 (S.D.N.Y. June 1, 2001) (rejecting insurer's argument that it shared a "unity of interest" with the re-insurer; while their commercial interests coincided, no evidence demonstrated that the insurer and re-insurer shared the same counsel or coordinated legal strategy in any way); *Front Royal Ins. v. Gold Players, Inc.*, 187 F.R.D. 252, 258 (W.D. Va. 1999) (holding the common interest doctrine does not apply to communications "created in the ordinary course of business under the contractual obligations between insurer and reinsurer").

¹⁵² *Supra* note 151.

¹⁵³ *Great Am. Surplus Lines Ins.*, 120 F.R.D. at 537; see also CAL. EVID. CODE § 912 (West 2015) (stating disclosure does not waive privilege if it is "reasonably necessary for the accomplishment of the purpose for which the lawyer . . . was consulted . . .").

dictate that a re-insurer would want to examine business documents from the insurer, especially as they relate to shared liability.¹⁵⁴ Consequently, the court reasoned that recognizing such a disclosure as a waiver of privilege would be an undue interference from the court.¹⁵⁵

Other courts, as in *Durham Industries v. North River Industries, Inc.*, have similarly held that when a re-insurer shares a percentage of liability with the insurer, the two parties have “clearly identical” interests.¹⁵⁶ The *Durham* court noted that the traditional common interest exemption test asks whether the two parties have a sufficiently common legal interest regarding a privileged communication that relates to legal advice.¹⁵⁷ For the *Durham* court, sharing liability between the re-insurer and the insurer constituted a sufficiently common legal interest.¹⁵⁸

On the other side, courts tend to not recognize the common interest exemption for re-insurers when the privileged communications between insurer and re-insurer are part of the ordinary course of business.¹⁵⁹ The existence of an insurer/re-insurer relationship does not in itself establish that the two parties have sufficiently common interests because the parties could be antagonistic to each other.¹⁶⁰

Even the courts, in the re-insurer context, with the narrowest approach to the common interest exemption define it as two parties “embodying a cooperative and common enterprise towards an identical legal strategy.”¹⁶¹ None of the courts go as far as to suggest that an identical legal strategy means that one party to the privileged information must necessarily offer legal advice to the other. The question for the courts asks whether the parties share the same legal interest in terms of an end result, not whether one party shapes the other’s approach.

¹⁵⁴ *Great Am. Surplus Lines Ins. Co.*, 120 F.R.D. at 537.

¹⁵⁵ *Id.* at 538.

¹⁵⁶ *Durham Indus.*, No. 79 Civ. 1705 (RWS), 1980 WL 112701, at *3.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at *1–2.

¹⁵⁹ *Front Royal Ins. v. Gold Players, Inc.*, 187 F.R.D. 252, 257 (W.D. Va. 1999).

¹⁶⁰ *Reliance Ins. v. Am. Lintex Corp.*, No. 00 CIV 5568 WHP KNF, 2001 WL 604080, at *4 (S.D.N.Y. June 1, 2001); *see also* *Regence Grp. v. TIG Specialty Ins.*, No. 07-1337-HA, 2010 WL 476646, at *2 (D. Or. Feb. 4, 2010) (holding insurer and re-insurer do not have common interest when they had previously engaged in contested arbitration).

¹⁶¹ *Fireman’s Fund Ins. v. Great Am. Ins. Co. of N.Y.*, 284 F.R.D. 132, 139 (S.D.N.Y. 2012) (quoting *Lugosch v. Congel*, 219 F.R.D. 220, 237 (N.D.N.Y. 2003)); *see also* *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989) (inquiring whether “a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel”).

Consider *Fireman's Fund Ins. v. Great American Ins. Co. of New York*, where the court held that evidence of shared counsel or *coordinated* strategy would be sufficient to find a common interest, but it is not necessary.¹⁶² The *Fireman's Fund* court ruled against applying the common interest doctrine because the relationship of insurer/re-insurer alone (without other evidence presented) did not per se establish sufficiently common interests.¹⁶³ But the court did signal that evidence of “a joint prosecution[,] . . . shared legal expenses, or that one party exercised control over the conduct of the action” would indicate a common legal interest.¹⁶⁴

This approach is much less restrictive than how the courts apply the common interest doctrine for third-party litigation funders.¹⁶⁵ Moreover, it is consistent with the underlying policy goal of attorney–client privilege, which is to encourage effective rendering of counsel. Protecting shared information by attorney–client privilege encourages the information to be shared. If a litigant shares information with a re-insurer, the litigant is more readily able to afford counsel. Affording counsel is a subset of effective rendering of counsel. Hence, affording protection to information shared with a re-insurer fulfills the policy goal of attorney–client privilege.

IV. ANALYSIS OF THE DISPARATE TREATMENT OF THE COMMON INTEREST DOCTRINE

The first section of this Part analyzes courts' different approaches to the common interest doctrine. While courts narrowly apply the common interest doctrine to third-party litigation funders, they apply the common interest doctrine more broadly to insurers of defendants. The second section of this Part argues that a broad common interest doctrine (as is applied to insurers of defendants) should be similarly applied to third-party litigation funders. Doing so would better effectuate the policy goal of attorney–client privilege.

A. *Two Approaches to the Common Interest Doctrine*

When courts decide whether the common interest doctrine applies, the crux of their analysis focuses on whether the parties share a common *legal* interest.

¹⁶² 284 F.R.D. at 140–41.

¹⁶³ *Id.* at 141.

¹⁶⁴ *Id.*

¹⁶⁵ *See supra* Part II.

While determining what constitutes a common legal interest appears straightforward, courts waver in their definitions of the term “legal.”

Courts fall into one of two general categories: (1) courts that characterize a common legal interest as having a shared interest in a legal outcome; and (2) courts that characterize a common legal interest as actively coordinating a legal strategy with one another.¹⁶⁶

The plain meaning of legal is not so immediately clear that it is obvious which of the two above categories has a better understanding. Similarly, the dictionary definition of legal is not precise enough to point to which court definition is more suitable.¹⁶⁷

Consider the following hypotheticals:

Situation One: Client A, a potential plaintiff, gives document X, about the merits of his potential claim, to his attorney B. Attorney B consciously discloses, at the request of client A, document X to friend C who is a fiction writer researching his next legal drama Y.

Regardless of what document X is about, when client A transmits document X to his attorney B the communication becomes protected by attorney–client privilege. When attorney B discloses document X to friend C, it is a disclosure to a third party waiving attorney–client privilege. Client A cannot avail himself of the common interest doctrine because friend C’s only concern is situation Y. Friend C, although obviously interested in document X, has no common *legal* interest in X. Friend C’s interest is no more than that of an observer.

The policy goal of attorney–client privilege is to encourage effective rendering of counsel. As a disclosure of privileged material is made to a person no way affiliated with the client’s legal issues, such a disclosure typifies the classic example of an implied waiver of attorney–client privilege.

Situation Two: Client A, a potential defendant, gives document X, about the merits of the potential claim, to his attorney B. Client A is insured by insurer C, who is legally obligated to defend the claim. Attorney B transfers document X to insurer C, so that insurer C can analyze the claim’s merits. Insurer C is not a

¹⁶⁶ See *supra* Part III.

¹⁶⁷ *Legal*, MERRIAM-WEBSTER DICTIONARY, <https://ahdictionary.com/word/search.html?q=legal> (last visited Mar. 29, 2017).

client of attorney B and retains its own independent counsel. Insurer C actively coordinates defense strategy with client A.

Document X becomes protected by attorney–client privilege when client A transfers it to attorney B. Attorney B’s transfer of document X to insurer C constitutes disclosure of a privileged document to a third person. Such a disclosure impliedly waives attorney–client privilege, unless client A and insurer C can avail themselves of the common interest doctrine.

Here, client A and insurer C not only share liability concerns from the potential outcome of the lawsuit, but they also actively plan their litigation strategy together. All courts would readily hold that planning a joint defense constitutes sharing a common legal interest. Sharing a common legal interest means client A could use the common interest exemption to prevent waiver of attorney–client privilege for case information disclosed to insurer C.

Situation Three: Defending insurer A transfers document X about the claim it is defending to attorney B to inform its re-insurer C. Re-insurer C is providing money to partially fund the defense. Defending insurer A and re-insurer C retain their own independent counsels.

Document X becomes protected by attorney–client privilege when insurer A transfers it to attorney B. Attorney B’s transfer of document X to re-insurer C constitutes disclosure of a privileged document to a third person. Such a disclosure impliedly waives attorney–client privilege, unless insurer A and re-insurer C can avail themselves of the common interest doctrine.

The business relationship between re-insurer C and insurer A does not by itself evince a common legal interest. However, as re-insurer C is contributing funds to insurer A to support the defense effort, they share an interest in the outcome of the case. This shared liability, underscored by the funds contributed toward a joint defense effort, constitutes a sufficiently common legal interest. Most courts would hold that the parties may avail themselves of the common interest doctrine.

Situation Four: Client A, a potential plaintiff, prepares document X regarding the merits of his potential claim for person C. Client A transfers document X to his attorney B. Attorney B then transfers the document to person C. Person C is a potential third-party litigation funder for the claim. Person C analyzes document X as a part of the due diligence process to determine whether to invest in the lawsuit.

Document X receives attorney–client privilege when client A transfers it to attorney B. The disclosure to person C constitutes an implied waiver, unless client A can avail himself of the common interest doctrine. The majority position (as illustrated by *Caterpillar*) suggests that person C roots from the sideline about the outcome of the lawsuit.¹⁶⁸ Under this position, the “rooting for” interest of the third-party litigation funder is not enough to constitute a sufficiently common legal interest.¹⁶⁹ To avail themselves of the common interest exemption, the parties must actively plan litigation strategy together.¹⁷⁰

From a meta-perspective, scenarios two and four illustrate the narrow interpretation of the common interest exemption. As portrayals of the narrow interpretation, scenario two shows where a party may avail itself of the common interest exemption and scenario four shows where a party may not. In contrast, scenario three illustrates the broader interpretation of the common interest exemption.

As portrayals of the narrow interpretation, why do the insurer and defendant in scenario two receive protection from the common interest doctrine but the plaintiff and third-party litigation funder in scenario four do not? The insurer in scenario two, in addition to providing funds for the defense, actively coordinates the defense strategy with the defendant. This differs from the third-party litigation funder in scenario four, whom only provides funds for the plaintiff without any direct involvement coordinating legal strategy. Hence, while the legal interest that the insurer in scenario two shares with the defendant is built on more than just a financial outcome, the third-party-litigation funder’s only involvement in the case is financial.

In contrast, in situation three, demonstrating the broader interpretation of the common interest doctrine, the re-insurer has a sufficiently common legal interest despite only providing funds to the insurer defending the case. Whereas not actively coordinating legal strategy prevents the third-party litigation funder in scenario four from using the common interest doctrine as a discovery shield, this is not an impediment to the re-insurer in scenario three.

For a document to lose its protection from attorney–client privilege because it actually *reaches* the place where it was intended to go defeats the goal of attorney–client privilege (the goal of enabling clients to most effectively obtain

¹⁶⁸ See *Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 732 (N.D. Ill. 2014).

¹⁶⁹ See *id.*

¹⁷⁰ See *id.*

legal counsel). The document is going to the place where it was originally intended; a place that enables the lawsuit to take place.

Many risk averse plaintiffs may not be able to litigate costly claims, just as many defendants cannot afford costly defenses. Third-party litigation funders allow undercapitalized plaintiffs to proceed with their claim. Similarly, insurers and re-insurers enable potential defendants to afford the expenses of a defense. The third-party litigation funders have at least as much of a common interest in the plaintiff's claim as does a re-insurer contributing funds to a defending insurer. Put in terms of their purposes:

Intuitively, insurers (and re-insurers) allow defendants to share the risk inherent with any lawsuit. Third-party litigation funders allow plaintiffs to share the risk inherent with any lawsuit.¹⁷¹

Hence, no obvious reason exists for why courts would treat insurers and re-insurers differently than third-party litigation funders when applying the common interest doctrine. The last part of this Comment argues for a uniform common interest doctrine.

B. A Uniform Common Interest Doctrine

This Comment relies on a policy argument to highlight why the broader definition of common legal interest is preferable. As the common interest doctrine operates as an exemption from the normal waiver rules of attorney–client privilege,¹⁷² this Comment advances the notion that the best interpretation of the common interest doctrine would further the policy goal of attorney–client privilege. Essentially, a broad definition of common legal interest furthers the goal of attorney–client privilege because it allows plaintiffs and defendants to seek out funding for litigation while shielded from the fear of waiving privilege.

Discussed earlier in this Comment, attorney–client privilege developed to encourage clients to openly speak with their attorney within the confines of confidentiality.¹⁷³ By encouraging these communications, clients can obtain the most effective counsel.

An expansive common interest doctrine furthers this goal because in some lawsuits the litigants cannot afford the cost of litigation. To pay these expenses,

¹⁷¹ Molot, *supra* note 26, at 73 (describing how funders permit plaintiffs to hedge their bet).

¹⁷² See *supra* note 39 and accompanying text.

¹⁷³ See *supra* notes 29–31 and accompanying text.

of which a large portion is the cost of counsel, litigants may turn to a third party to help fund the suit.¹⁷⁴ In other words, the third party's funding (whether that be from an insurer, re-insurer, or third-party litigation funder) effectively renders counsel for the litigant. A litigant that cannot pay for counsel likewise cannot obtain counsel.

There is a fear that applying the common interest doctrine broadly, to protect information shared with third party-litigation funders, leads to an overly expansive attorney-client privilege. Although courts tend to want to construe attorney-client privilege narrowly,¹⁷⁵ the broader interpretation of the common interest doctrine does not extend attorney-client privilege. As discussed earlier,¹⁷⁶ the common interest doctrine does not afford privilege to new classes of documents or parties; rather, to even consider whether the common interest doctrine applies to a disclosed document means that the document is already protected by attorney-client privilege. Deciding the range of parties covered by the common interest doctrine is entirely separate from discussing the breadth of attorney-client privilege. Thus, this Comment's advocacy for a broad common interest doctrine does not run afoul of courts' narrow construction of attorney-client privilege.

This Comment proposes a common interest doctrine that recognizes parties as having a common legal interest if they (1) share liability, (2) share a joint interest in the outcome of litigation, or (3) actively coordinate legal strategy. Doing so incentivizes litigants to explore all avenues of support as they contemplate litigation.

CONCLUSION

The discovery process enables litigants to fairly assess all possible evidence while building their case. As desirable as it is to permit wide-ranging discovery, courts recognize various constraints on the process because of countervailing policy concerns.

Work-product privilege and attorney-client privilege exemplify two of these constraints. Their existence signifies courts' respect for the role of counsel in the judicial system. Just as a litigant cannot be compelled to divulge his or her inner

¹⁷⁴ See *supra* note 24.

¹⁷⁵ *Fisher v. United States*, 425 U.S. 391, 403 (1976).

¹⁷⁶ See *supra* notes 38-39; see also *Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 731 (N.D. Ill. 2014).

speculation, courts recognize a litigant's counsel as an extension of the litigant. By protecting both confidential communications from the client to the attorney (with attorney–client privilege) and an attorney's legal theorizing in anticipation of litigation (with work-product privilege), courts signal that every litigant should have free reign to acquire the most effective counsel.

Of course, there can be too much of a good thing. And courts rightfully have limited the extent of both privileges. For work-product privilege, disclosing information that makes it more likely to fall into the hands of an adversary indicates that the privilege holder lacks concern for keeping the information confidential. Hence, courts treat such a disclosure as a waiver of work-product privilege.

For attorney–client privilege, a disclosure of privileged information to any third party indicates that the litigant did not intend to keep that information confidential. Consequently, the purpose behind making the information privileged no longer exists; courts recognize that such a disclosure indicates an implied waiver of attorney–client privilege.

But such a broad waiver rule for attorney–client privilege does not account for disclosures to a third party that share a legal interest with the privilege holder. As the purpose of attorney–client privilege is to encourage clients to obtain the most effective legal counsel, it would be inconsistent to waive the privilege when a client makes a disclosure for the very purpose which attorney–client privilege developed to encourage.

Recognizing this inconsistency, courts developed the common interest doctrine to create an exemption from normal waiver rules for a disclosure of privileged information made to a third-party sharing a common legal interest with the privilege holder. Intuitive as such an exemption may be, courts waver in their understandings of what constitutes a sufficiently common legal interest to warrant applying the exemption.

Many courts, out of a fear of overly broadening the reach of attorney–client privilege, have narrowly construed what constitutes a common legal interest. For these courts, unless a third party actively coordinates litigation strategy with a privilege holder, the common interest doctrine does not shield their disclosures from waiver.

But these courts mistakenly treat the common interest doctrine as an extension of attorney–client privilege. The common interest doctrine does not

broaden the range of attorney–client privilege; rather, it only enters the discussion once attorney–client privilege is already recognized.

Moreover, a broad interpretation of the common interest doctrine—one that characterizes a common legal interest as loosely as a shared interest in a potential legal outcome—furtheres the policy goal of attorney–client privilege. Disclosures made to third parties that provide funding to a litigant’s case should be exempted from waiver. These third parties’ vested interest in the legal outcome of a case is a sufficiently common legal interest because the third parties’ funding makes a litigant more able to afford legal expenses.

Conceptually, the policy goal of attorney–client privilege, effective rendering of counsel, is intertwined with the cost of legal expenses. Thus, recognizing a broad common interest, one that shields disclosures made to third parties contributing funds to lawsuits (whether those be insurers, re-insurers, or third-party litigation funders), furtheres the policy underlying attorney–client privilege.

JEFFREY SCHACKNOW*

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